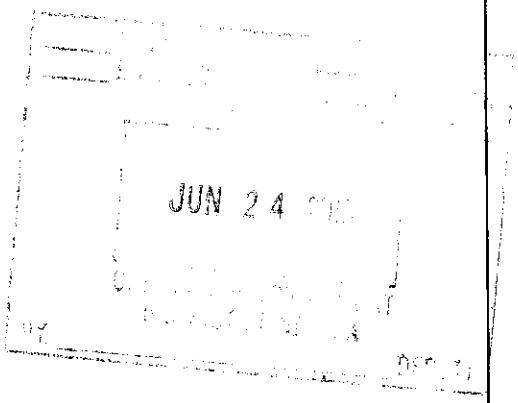

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN S. CROSWELL, III, and LINDA C. CROSWELL, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, et al., Defendants.	3:08-CV-00445-RCJ-(VPC) **ORDER**

This is a personal injury claim for work-related injuries. Plaintiffs John S. Croswell and Linda C. Croswell sued Defendants Union Pacific Railroad Co. ("Union Pacific"), M-I Swaco, M-I Drilling Fluids International Inc., M-I, L.L.C., a Nevada limited liability company, and M-I, L.L.C., a Delaware limited liability company (collectively, "Defendants"), alleging negligence under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* ("FELA"), state-law negligence, and loss of consortium. Presently before the Court is Defendants first motion in limine (*see* #50). Plaintiffs have opposed Defendants' motion (#58). The Court heard oral argument on June 11, 2010. The Court now issues the following order. Defendants' first motion in limine is DENIED. The denial is without prejudice to potential jury instructions. The Court invites further briefing on the proper jury instructions relating to the issues in this motion.

I. Background

The nature of Plaintiffs' case is as follows. Mr. Croswell worked for Union Pacific as a brakeman. (Compl. (#1) ¶ 12). On August 7, 2007, he was riding Union Pacific's train while

working in M-I industry[1] premises located in Battle Mountain, Nevada. (*Id.*). Mr. Croswell was riding on the side ladder of a boxcar. (*Id.* at ¶ 13). The train rounded a curve and headed towards stacked loading pallets that were placed too close to the track. (*Id.*). Mr. Croswell could not see the pallets in time to avoid them because his view was obstructed due to the curve in the track. (*Id.*). He could not climb to the top of the box car to avoid the pallets because the grab bars on the box car did not go up high enough. (*Id.*). There was nowhere he could safely jump. (*Id.*). Mr. Croswell collided with the pallets and suffered injuries. (*Id.* at ¶¶ 13–15).

Plaintiffs sued Defendants, alleging that Union Pacific is liable under the Federal Employers' Liability Act for negligence and strict liability for failing to conform to Nevada regulations and Nevada Public Service Commission orders. Plaintiffs also allege that Union Pacific and M-I are liable for common-law negligence and that M-I is liable for Mrs. Croswell's loss of consortium. (Compl. (#1)).

Union Pacific answered and asserted a cross-claim against M-I. Union Pacific alleges that it is entitled to indemnification from M-I under an express agreement and under equitable principles and, alternatively, entitled to contribution from M-I. (Am. Ans. (#19) 6:8–9:21). M-I also answered Plaintiffs' complaint. (Ans. (#16)).

II. LEGAL STANDARD

"Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984).[2] Courts have broad discretion when deciding motions in limine. *Mason v. City of Chicago*, 631 F. Supp. 2d 1052, 1055 (N.D. Ill. 2009). Evidence may be excluded only if it is inadmissible on all potential grounds. *Id.*

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[1] The parties do not carefully distinguish the variously-named M-I defendants. For purposes of this memorandum, "M-I" refers to all the M-I defendants.

[2] "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." Fed. R. Evid. 103(c).

Otherwise, the evidentiary ruling must be deferred until trial. *Id.* at 1055–56. The party moving to exclude has the burden of showing the evidence is inadmissible for all potential purposes. *Id.* at 1056.

III. ANALYSIS

In Plaintiffs' second cause of action, they assert that Nevada Administrative Code §§ 705.030 and 705.062 are statutes that are incorporated into the FELA through 45 U.S.C. §§ 53 and 54a. (Compl. (#1) ¶ 18). Defendants argue that §§ 705.030 and 705.062 do not constitute statutes under 45 U.S.C. §§ 53 and 54a. Plaintiffs argue that Defendants are attempting a "backdoor" motion for summary judgment on this issue and that the Nevada regulations should be considered "statutes."

Section 53 establishes a comparative negligence regime for actions against railroads with a proviso that an employee's negligence shall not diminish his recovery if the railroad's violation of a "statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C. § 53.

"A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49 is deemed to be a statute under sections 53 and 54 of this title." 45 U.S.C. § 54a. Under section 20105 of Title 49, "[t]he Secretary concerned may prescribe investigative and surveillance activities necessary to enforce the safety regulations prescribed and orders issued by the Secretary that apply to railroad equipment, facilities, rolling stock, and operations in a State. The State may participate in those activities when the safety practices for railroad equipment, facilities, rolling stock, and operations in the State are regulated by a State authority and the authority submits to the Secretary concerned an annual certification . . . ." 49 U.S.C. § 20105(a).

"Section 54a of Title 45 and section 20105(a) of Title 49, when they are read together, make clear that state regulations, requirements, etc., are deemed federal safety regulations only when they make the state a participant in the enforcement of such regulations." *Fletcher v. Chicago Rail Link, L.L.C.*, 568 F.3d 638, 639 (7th Cir. 2009). "Section 54a requires treating

state regulations that support or implement federal safety norms as if they were federal regulations, but there is no basis for thinking that the statute goes further than that." *Id.* at 640. A state regulation that requires railroad vehicles to be maintained in safe conditions does not implement federal safety norms and is thus not a statute for section 53 purposes. *Fletcher*, 568 F.3d at 638–41. In so concluding, the Seventh Circuit reasoned that a key purpose of the FELA was to create a nationally uniform law of railroads. *Id.* at 640; *see* 49 U.S.C. § 20106(a)(1). Thus, state laws that do not simply implement federal railroad safety laws should not be treated as statutes under § 53. Otherwise, two states with identical laws would afford disparate damages depending on whether they participated in the investigative and surveillance activities specified in § 20105. *Fletcher*, 568 F.3d at 640.

Plaintiffs argue that Congress did not intend the FELA to preempt all state safety regulations and specifically recognized that some state regulations may coexist with the FELA. (Pl.'s Opp'n (#58) 4:14–5:19). This is not at issue. The issue is whether state regulations should effect a negligent plaintiff's recovery in the same way that federal safety regulations do. Plaintiffs also characterize Defendants argument as suggesting that only FRA regulations may qualify as statutes under § 54(a). (Pl.'s Opp'n (#58) 5:20–6:9). This is inaccurate. Defendants argue that FRA safety regulations and federal safety statutes *and* state statutes and regulations that support and implement them qualify as statutes under § 54(a). Plaintiffs largely rely on *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517 (6th Cir. 2001). (Pl.'s Opp'n (#58) 8:20–9:25). But, *Tyrrell* only addressed whether an Ohio railroad safety regulation was preempted by federal law, not whether it qualified as a "statute" under § 54(a) to prevent reduction in damages for comparative negligence. *See Tyrrell*, 248 F.3d at 520–25.[3]

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[3] Plaintiffs also rely on non-binding, unpublished district court opinions and state court opinions that hold that *any* regulation by a state agency participating in investigative and surveillance activities is a "statute" under § 54(a). *See Wells v. San Joaquin Valley R.R.*, 1:06-CV-00678, 2007 U.S. Dist. LEXIS 74729, at *12–13 (E.D. Cal. Sept. 25, 2007); *Wagner v. Union Pacific R.R. Co.*, No. Civ. S-03-0582, 2004 U.S. Dist. LEXIS 31117, at *3–6 (E.D. Cal. July 16, 2004); *Whitley v. Southern Pacific Transp. Co.*, 902 P.2d 1196, 1202–04 (Or. Ct. App. 1995).

Plaintiffs also argue that Defendants' motion is a disguised and untimely motion for summary judgment. Though Defendants are not seeking an evidentiary ruling, a ruling on this matter before trial will be helpful to an orderly trial as it will affect whether evidence of Mr. Croswell's own negligence is relevant to damages and will influence the jury instructions. Because this issue is primarily concerned with jury instructions, the Court invites further briefing on the matter in regard to the proper jury instructions in this case.

Plaintiffs finally argue that Defendants admitted that the Nevada regulations are statutes because they did not respond in their answer to Plaintiffs' allegation that the Nevada regulations were incorporated through the FELA. Defendants asserted that Plaintiffs' allegation did not require a response. Plaintiffs' allegation contained a legal conclusion. It is for the Court to decide legal matters. The parties may not alter the law by agreement. Therefore, Plaintiffs' argument is unpersuasive.

Under Nevada Administrative Code § 705.030, most objects must be at least eight feet and six inches away from the center line of a railroad track for transporting freight cars. Nev. Admin. Code § 705.030(1)(i). Section 705.062 also prohibits the placement of articles within eight feet and six inches from the center line of the track. Nev. Admin. Code § 705.062(1). Nevada is a participant in the investigative and surveillance activities specified in § 20105. (State Rail Safety Programs Managers, attached as Ex. A to Def.'s Errata to Mot. in Limine (#52), http://www.fra.dot.gov/downloads/Safety/StateManagers2009.pdf). Defendants assert that Nevada Administrative Code §§ 705.030 and 705.062 do not implement any federal regulation or statute. The Court has likewise found no federal statute or regulation regarding minimum side clearance of railways. Plaintiffs provide quotations from the Federal Railroad Administration that state that it does not proscribe clearance distances for tracks. (Pl.'s Opp'n (#58) 6:10–7:1). Therefore, any violation of Nevada Administrative Code §§ 705.030 and 705.062 by Defendants does not override the general comparative negligence regime under the FELA.

To hold otherwise would lead to inconsistent results across states. A plaintiff in Nevada would be able to recover 100% of his damages despite his comparative negligence

if the defendant had stacked materials eight feet from the track. But, if in another state, the state regulation only mandated side clearances of seven feet, the plaintiff in that state would have his recovery reduced by his comparative negligence if the defendant stacked articles eight feet from the track. This would be counter to Congress' proclamation that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). Though the Court has revealed its inclination to agree with Defendants, because this matter may be revisited during the selection of jury instructions, the Court denies the present motion without prejudice.**IV. CONCLUSION** Accordingly, IT IS ORDERED that Defendants' Motions in Limine (#50) is GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that Defendants' first motion in limine is DENIED. The Court also expects further briefing on the issue in Defendants' first motion in limine during the selection of jury instructions. This ruling is without prejudice to potential jury instructions.

IT IS SO ORDERED.

DATED: This 23rd day of June, 2010.

Robert C. Jones
UNITED STATES DISTRICT JUDGE